REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION APPEAL NO. 2 OF 2013

(Being an Appeal from the Ruling and Order of HON. Onyango PM dated 4th June, 2013 made in Meru Chief Magistrates Election Petition No. 1 of 2013)

LESIIT J.

JACOB MWIRIGI MUTHURI……APPELLANT

V E R S U S

JOHN MBAABU MURITHI…….1ST RESPONDENT

LUCY MBITHI R/O BUURI CONSTITUENCY……2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION……3RD RESPONDENT

JUDGEMENT

1. The Appellant JACOB MWIRIGI MUTHURI is the first Respondent in the Meru Chief Magistrate Election Petition No. 1 of 2013. He filed an appeal before this court simultaneously with a Notice of Motion application. In the application he was seeking the following orders:

1. **…**

2. **…**

3. **That there be a stay of proceedings Meru Chief Magistrates Election Petition No. 1 of 2013 pending the hearing and determination of the appeal.**

4. **That cost of the application be provided for."**

2. The basis for the application cited on the face of the Motion are the following five grounds:

1. **That the 1st Respondent is aggrieved by the Order of the lower court made on 4.6.201 directing for the scrutiny and recount of all ballot papers as no basis had been laid.**

2. **That the Petitioner has instituted an appeal against the said ruling and the proceedings have been typed and certified.**

3. **That the Petitioner shall not be prejudiced in anyway if the orders of stay of execution are granted.**

4. **That this application is intended to facilitate the just and proportionate resolution of the dispute between the parties.**

5. **That this application has been instituted without unreasonable delay.**

3. The court heard the application and granted the stay sought by the Appellant pending the hearing and determination of this Appeal.
4. The Appeal itself was based on a Memorandum of Appeal in which four grounds are cited namely:

1. **That the learned trial magistrate erred in law and fact by allowing Application dated 20th May 2013 which application is not merited.**

2. **That the learned trial magistrate erred in law and fact by allowing scrutiny of votes whereas there was no such prayer in the Petition.**

3. **That the learned trial magistrate erred in law and fact by allowing scrutiny and recount in an application where no basis had been laid to warrant such an order.**

4. **That the learned trial magistrate erred in law and fact by entertaining an application which was premature and therefore occasioned the Appellant miscarriage of justice.**

4. The Appeal was opposed. The 1st Respondent has filed grounds of opposition which are dated 18th June, 2013 they contain 11 grounds namely:

i. **The appeal has no any chances of success.**
ii. **A prayer for a recount is the main prayer in the Petition.**

iii. **The law and the rules envisage application for recount and or scrutiny at any stage of the proceedings.**

iv. **The prayer for scrutiny and recount will not prejudice any party in the Petition.**

v. **The constitution provided strict timelines for the conclusion of the Petition.**

vi. **The Application is incompetent and only meant to prolong the Petition unnecessarily.**

vii. **The 1st Respondent in this appeal laid a strong basis for scrutiny and recount.**

viii. **Facts as stated in the Petitioner's/Respondents' affidavit were uncontroverted by the appellant or any other party.**

ix. **That this application is a strong indication of panic on the side of the appellant.**

x. **The Appellant/Applicant should be the first person to confirm his win in scrutiny and recount if indeed he won fairly.**

xi. **The appeal is defective as it offends Rule 34(1) of the Election Petition Rules.**

5. The 2nd and 3rd Respondents do not oppose this Appeal.

6. Mr. Mwanzia represented the Appellant and argued the four grounds of Appeal together in his submissions. Mr. Mwanzia urged that the Application to have scrutiny and recount within Kibirichia among other prayers, which the court allowed, was filed before the lower court way before the Petition was set down for hearing and before the Pre-trial Conference had taken place and therefore before directions were given as to the hearing of the Petition and as to the issues for determination. Mr. Mwanzia urged that the learned trial magistrate erred in law and fact by allowing that application. Mr. Mwanzia urged that under Rule 32 of the Elections (Parliamentary and County Election) Petition Rules, hereinafter referred to the Election Rules, provides for recount and re-tallying where the only issue in the Petition is recount. He urged that in the Petition before the lower court contained many other prayers other than prayer for recount.

7. The second point urged by Mr. Mwanzia was that under Rule 33 of the Election Rules a yardstick is given which is that one must demonstrate a sufficient reason to warrant scrutiny by laying a basis. Mr. Mwanzia urged that since the Respondents had opposed that application the only option in that case was to place the 1st Respondent hereinin the dock and test his evidence in order to determine whether sufficient reason or basis had been created.

8. Mr.Mwanzia relied on the **MERU ELECTION PETITION NO. 4 OF 2013 PETKEY MIRITI VS SAMUEL RAGWA AND OTHERS** where this court dismissed an application for scrutiny and recount on the basis the application was premature having been brought at the Pre-trial Stage. Counsel also relied on the case of **PETER KINGARA VS IEBC AND TWO OTHERS NYERI ELECTION PETITION NO. 3 OF 2013**, for the same proposition that an application for scrutiny and recount can only be considered at the trial.

9. Mr. Mwanzia also invoked Section 82(1) of the Elections Act and emphasized the words ***during the hearing*** and urged an order for scrutiny can only be made during the hearing of the Election Petition and not before, as the learned trial magistrate did in the case appealed from. Section 82 (1) of the Elections Act provides:

> **"Scrutiny of votes.**
>
> **82. (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.**

10. Mr. Ondari Advocate is counsel for the 1st Respondent in this Appeal and the Petitioner in the Election Petition case before the lower court. Mr. Ondari urged that the learned trial magistrate

acted within the law and was not in error.Counsel urged that the 2nd and 3rdRespondents did not file any response to the Petitioner's application for scrutiny and recount and that therefore the Petitioner's averments in the application were not controverted. That what the Petitioner filed did not controvert the Petitioner's averments as the party best placed to controvert them was the IEBC who failed to file responses. Counsel urged that the application before the lower court was unopposed.

11. Mr. Ondari urged that the Petitioner's/1stRespondent's case in this appeal. Learned counsel submitted that the principle prayer in the Petition was a prayer for recount of votes and that all other prayers were pegged on it; that in the circumstances the major issue was recount of votes.He urged that the application was in compliance with Rule 33 of the Election Rules. Mr. Ondari submitted that the Election court had power to order recount on its own motion or on application. He urged that the application was based on the evidence in the pleadings, and that the court had come to the conclusion that a basis had been laid for the recount and the same should not be disturbed.
12. Mr. Ondari relied on several cases; **KAMANDA Vs WANJIRU & OTHERS NAIROBI HC ELECTION PETITION NO. 5 of 2008**. In this case the court heard evidence before he made the order for scrutiny and it's therefore not helpful to the 1stRespondent; **SAID Vs MWARUWA & ANOTHER NAIROBI ELECTION PETITION NO. 1 of 1983** where the court ordered a recount of votes. The only distinction with the instant case is that the regimes of laws that applied to that case are different from those applicable currently. The court held then that even though the court had no power to order a recount of votes, it had the power to conduct a scrutiny and the court proceeded to order scrutiny and held that the order would lie without requiring the Petitioner to lay a foundation therefor; **AMBALA Vs WAITHAKA & ANOTHER {2008} 1 KLR 296** where the Petitioner abandoned all other prayers except recount of votes and the court granted same. The case is distinguishable from the current one as the Petitioner's only issue for determination in the cited case was recount of votes; the same pertains to the case of **ANASWA Vs MBERIA & ANOTHER ELECTION PETITION NO 6 of 1988**. In **JOHO & 2 OTHERS Vs NYANGE & ANOTHER {2008} 3 KLR 388**, the court heard five witnesses before making the order for scrutiny and recount and observed in his ruling that the Petitioner had laid enough basis for the order of recount. The case of **RAILA ODINGA** Petition where the Supreme Court ordered a recount *suamoto* was not provided.
13. Mr. Meli appeared for the 2nd and 3rdRespondents. Counsel supported the appeal and urged that contrary to the submission by learned counsel for the 1stRespondent, his clients filed grounds of opposition, replying affidavit and list of authorities all which controverted the averments by the Petitioner in support of both the Petition and the application for scrutiny.
14. Mr.Meli submitted that the Petitioner did not satisfy the provisions of Rules 32 and 33 of the Election Act. In regard to Rule 32, Counsel urged that the scrutiny and recount was only available where the only issue was recount and re-tally; that in this case the Petitioner had raised several issues including fraud, collusion, and intimidation of Agents. Counsel urged that the order could not be made pursuant to the said Rule 32 since under sub Rule (2) the Petitioner was required to specify that he did not require any other determination except recount and re-tally of votes, which he did not do.
15. Regarding Rule 33, counsel urged that the Petitioner was required to disclose sufficient reason and that the only way to do so was by way of calling evidence. Furthermore, counsel urged, the order if made would be confined to the Polling Stations where results were contested. For that proposition Mr. Meli relied on the case of **NGANGA & ANOTHER Vs OWITI & ANOTHER [2008] 1 KLR 199**where the court held that an election court could make an order for recount and scrutiny at any time before judgment, but went ahead to find that no justification had been made for the order of scrutiny and recount after hearing the Petition.
16. Mr. Meli submitted that it was not available to the court to order for scrutiny in absence of substantive prayer in the Petition. He urged that parties are bound by their own pleadings. For that proposition counsel relied on **ISAACK ALI Vs IEBC & OTHERS** which was not provided. Counsel also relied on **PHILIP OSORE OGUTU V MICHAEL ARINGO & OTHERS BUSIA H. C. ELECTION PETITION NO 1 of 2013** where scrutiny was ordered after hearing part of the evidence in the Petition, on application by the Petitioner.
17. Just like the learned counsel for the Appellant Mr. Mwanzia, Mr. Meli also invoked section 82 of

the Elections Act and urged that since under that section scrutiny could only be ordered during the hearing of the Petition, the application was premature as the hearing had not commenced.

18. Mr. Meli relied on the cases of **MASINDE Vs BWIRE& ANOTHER [2008] 1 KLR 547** and **KINGARA Vs IEBC & OTHERS [2013]eKLR**for the proposition that scrutiny can never be the first application in an election Petition and that basis must be laid; and that where the allegations have been controverted by witnesses, evidence must be heard. That the issues raised in the applications were of the nature which required evidence be tested through calling of witnesses. He also relied on the case of **JOHN KIARIE Vs BETH MUGO NAIROBI PETITION No 13 of 2008** and urged that the standard of proof required where election offences are alleged was higher than in civil cases.

19. This appeal challenges the order for **'scrutiny and recount of ballot papers and other documents in the learned trial magistrates ruling in which he ordered as follows:**

> "**I hereby direct that all documents and material to be delivered to court by the 3rd respondent pursuant to Rule 21 of the Election Petition Rules 2013 shall be scrutinized. In particular the following documents to be scrutinized.**

a. **Any written statement made by presiding officers**
b. **Any written complaints of the candidates and their representations.**
c. **Pocket of spoilt papers.**
d. **Counted ballot papers.**
e. **Rejected ballot papers**
f. **Any statement showing the number of rejected ballot papers.**
g. **Original forms 35 and 36 and any statutory forms in respect to Kibirichia Ward that are in possession of 2nd and 3rd respondents.**

The orders herein shall be effected under my supervision and/or an officer appointed by me."

20. The issues for determination are whether the learned trial magistrate erred in law and fact by allowing Application dated 20th May 2013 which application is not merited; whether the learned trial magistrate erred in law and fact by allowing scrutiny of votes whereas there was no such prayer in the Petition; whether the learned trial magistrate erred in law and fact by allowing scrutiny and recount and whether a basis had been laid to warrant such an order, and whether the learned trial magistrate erred in law and fact by entertaining an application which was premature and therefore occasioned the Appellant miscarriage of justice.

21. The statutory underpinning for scrutiny is section 82 of the Elections Act as read with Rules 32 and 33 of the Petition Rules.

Section 82 provides, in part:

1. ***An election court may, on its own motion or on application by any party to the Petition, during the hearing of an election Petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine…***

This law is very clear that a court can on its own motion order for scrutiny of votes. That being the case, it is not necessary for a prayer for scrutiny to be pleaded either in the Petition or the Petitioner's pleading for the court to make such order. The answer to ground two then is that the learned trial magistrate had power to make an order for scrutiny even where it is not pleaded or prayed for in the Petition and Petitioner's pleadings.

22. It has previously been held that the purpose of scrutiny is to assist the court to investigate whether allegations of irregularities and breaches of the law complained of are valid. That is what K. Kariuki, J. as he then was held in the case cited by Mr. Ondari, **WILLIAM MAINA KAMANDA V. MARGARET WANJIRU KARIUKI & 2 OTHERS ELECTION PETITION NO. 5 OF**

2008. In addition Rule 33 also alludes to the purpose of scrutiny where it provides that one may apply for an order of scrutiny '***for purposes of establishing the validity of the votes cast'.***

Rule 33 provides in part as follows:

> ***(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.***
>
> ***(2) Upon an application under sub-rule (1), the court may, if it issatisfied that there is sufficient reason, order for a scrutiny or recount of the votes.***
>
> ***(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.***
>
> ***(4) Scrutiny shall be confined to the polling stations in which the results are disputed… (emphasis mine)***

23. Three things can be gleaned from a reading of section 82 (1) and Rule 33. Firstly, an order for scrutiny can be made by a court *suo moto; secondly the court can make the order* upon application by a party to the proceedings and, thirdly, such an application can be made at any stage of the proceedings before judgment is entered.
24. Most courts have taken the view that an order for scrutiny should not be granted unless a basis has been laid for the same during the hearing. One such court was Kimaru, J in the case of ***JOHN WAWERU KIARIE Vs BETH MUGO [2008] eKLR***, cited by Mr. Meli. Kimaru J. declined to grant an order for scrutiny where it found that a basis for the same had not been laid. At page 25 of its decision, the court held:

> ***The Petitioner has failed to establish, to the required standard of proof, that the election of the 1st Respondent as the duly elected member of parliament of Dagoretti constituency was voided by electoral malpractices and therefore amenable to be nullified. The Petitioner further failed to establish any basis for this court to order the scrutiny of the ballots in respect of the parliamentary elections of Dagoretti constituency.***

25. In the case cited by Mr. Meli, Tuiyott, J had the following to say on the timing of such an application, in **PHILIP OSORE OGUTU V. MICHAEL ARINGO & 2 OTHERSBUSIA HIGH COURT PETITION NO. 1 OF 2013**

> **It all depends, I think, on the ability of the Applicant to marshal sufficient evidence to persuade the Court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the Affidavits accompanying the Petition or the responses.**

The learned judge concluded by stating:

> **An order for scrutiny will not be granted as a matter of course. In the words of Rule 33(2) of The Election Petition Rules, the Court must be satisfied that there is sufficient reason to require an examination of the ballots. This Rule codifies a long held Judicial opinion that scrutiny will only be ordered when a foundation or a basis has been laid.**

26. Where an election court is not acting sua moto, but has been moved by a party in the Petition then it must ensure that the relevant provisions of the law in that regard are satisfied. Rule 33(4) makes it clear that where a Petitioner seeks scrutiny, he must make it clear the polling stations whose results are disputed as these are the ones in relation to which scrutiny will be done. The court

should not grant a blanket order of scrutiny in all the polling stations if only the results of particular polling stations are disputed. The logic for this reasoning is that scrutiny is not given as a matter of course because there is the need to guard against an abuse of the process. This would be the case where a party is using the process as a fishing expedition to discover new and fresh evidence as opposed to seeking further particulars. The other reason being logistics that an exercise of scrutiny is often arduous and laborious painstaking exercise and should not be undertaken without cause.[See **PHILIP OSORE OGUTU V. MICHAEL ARINGO** case, supra]

27. Justice Ngaah, when considering an application for among other things scrutiny and recount in **PETER GICHUKI KING'ARA V. IEBC & 2 OTHERS NYERI ELECTION PETITION 3 OF 2013**, had this to say at page 15:

> ***Whether or not the basis laid is sufficient enough to warrant an order for scrutiny is for the court to determine based on the evidence available. As to when scrutiny can be ordered, Section 82(1)as read with Section 82(2)helps us understand that it is during the trial, at any time during the hearing of the Petition but before the final judgment has been delivered. The inevitable conclusion in the premises is that as far as the issue of scrutiny of votes is concerned it would be erroneous in law to order for scrutiny at the pre-trial stage unless the only issue in the Petition is the count and tallying of votes under Rule 32(1) of the Elections (Parliamentary and County) Petition Rules, 2013.***

28. I agree with my brother. Unless an order for scrutiny and recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness affidavits of the Petitioner.

29. It is clear from the foregoing that where an application for scrutiny is made, the court must be satisfied that an order for scrutiny and recounthas been justified by the party applying and secondly, that the order is necessary for the just resolution of the election Petition. Scrutiny is one of the tools that the court uses to investigate whether an election was conducted in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the Affidavit in support to find out whether they disclose the Petitioner's cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly bycalling of evidence and testing of that evidence through cross examination and re examination process to test the veracity of the same. There can be no need to call evidence for examination through the trial process if none has been advanced in the Petition and the Petitioner's pleadings and in particular the affidavits of potential witnesses.

30. I have perused the ruling of the learned trial magistrate. It is clear what the learned trial magistrate considered. He had this to say about the Petition and the prayer sought therein.

> **"The issue before me is whether this court can order scrutiny and recount of votes at this stage as sought by the Petitioner. Though it has been contended by the Respondents that the Petitioner sought other prayers other than that sought in this application I have examined the Petition and I note the Petitioner's main prayer is for recount of all votes from all Polling Stations within Kibirichia Ward. Though here are other prayers in the Petition they appear to follow from the primary one and would obviously flow were he to succeed in the main prayer. It is true as submitted by the Respondents that there is no prayer for scrutiny. In my view having examined the pleadings, should the court order for a recount then scrutiny would automatically follow as it would be ridiculous in the circumstances to proceed with a recount scrutiny.**

31. The learned trial magistrate went ahead to scrutinize certain Forms 35 from various Polling Stations within Kibirichia Ward and found as follows:

1. **The Appeal has no any chances of success.**
2. **A prayer for a recount is the main prayer in the Petition.**

3. **The law and the rules envisage application for recount and or scrutiny at any stage of the proceedings.**

4. **The prayer for scrutiny and recount will not prejudice any party in the petition.**

5. **The constitution provided strict timelines for the conclusion of the Petition.**

6. **The Application is incompetent and only meant to prolong the petition unnecessarily.**

7. **The 1st Respondent in this appeal laid a strong basis for scrutiny and recount.**

8. **Facts as stated in the Petitioner Respondents affidavit were uncontroverted by the appellant or any other party.**

9. **That this application is a strong indication of panic on the side of Appellant.**

10. **The Appellant/Applicant should be the first person to confirm his win in scrutiny and recount if indeed he won fairly.**

11. **The appeal is defective as it offends Rule 34(1) of the election petition rules**

32. The learned trial magistrate concluded as follows:

> "**Though no witness is yet to be heard (sic) Forms 35 provided to this court by the parties form part of the evidence. The forms speak for themselves. The Petitioner alleges in his affidavit that as a result of numerous allegations touching on counting and tallying the 1st Respondent benefited and was consequently declared the winner. The burden of proof of such allegations obviously falls squarely on the Petitioner. … the irregularities may be such that they do not affect the will of the voters in Kibirichia Ward. In my finding an order of scrutiny will assist the court to determine the truth… In Halbury's Law of England Fourth Edition Reissue Volume 15 page 622 it is provided.**
>
> > **'***if an application for recount is granted, the usual practice is order the recount to be taken before the trial by or officer appointed*an the purpose (sic)"

33. It is very clear that the learned trial magistrate was influenced by the Halbury's Laws of England when he made the order for scrutiny. The Law in Kenya is different as demonstrated in the various cases cited hereinabove in line with section 82 of the Elections Act, the Order for Scrutiny and or recount can only be made at any time during the hearing of the Petition and not before the trial unless the only prayer for determination in the entire Petition is for recount or re-tally of votes.

34. It is clear that the order challenged in this appeal was made at the pre-trial stage before any evidence was called. It was also made after the Petitioner applied for scrutiny and recount, and after the parties were heard *inter partes.* Not having been made *suamoto,* the order for scrutiny and recount made on 4th June, 2013 was in the circumstances undeserved, unmerited and therefore premature. The learned trial magistrate should have waited until evidence was called to establish a

basis for the order sought to be made. Having ordered before some evidence was called; the order made was premature, erroneous and cannot be sustained.

35. **I have come to the conclusion that the order for the recount and scrutiny of votes, made on 4th June, 2013 by Hon Onyango, PM was premature and I so find. Consequently, I allow the appeal and confirm the interim order made by this court at the interlocutory stage of this appeal. That order of stay is binding only in relation to the ruling of that court dated 4th June, 2013.**
36. **The learned trial magistrate has the power and the liberty to make the same or similar order if, after hearing evidence, whether in part or the whole, he is satisfied that a basis has been laid for such order to be made. This is because even where an order for scrutiny is declined at the beginning of the trial; a party is not precluded from making another application later in the proceedings ; and the court has the power to allow it, where the court considers that sufficient basis for the same has been laid.**
37. **The costs of this appeal will be met by the 1st Respondent.**

DATED, READ AND DELIVERED AT MERU THIS 8thDAY OF AUGUST, 2013.

LESIIT, J

JUDGE.